

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2019-17

May 7, 2019

### ALBERTA INFRASTRUCTURE

Case File Number F7952

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) dated October 1, 2013, to Alberta Infrastructure (the Public Body) for records relating to a purchase of land by a third party, and records relating to communications between the Public Body and the Applicant relating to a specified project.

The Public Body provided responsive records in January, March and December 2014 with information withheld under sections 4 (records to which the Act applies), 16(1) (disclosure harmful to business interests), 17(1) (disclosure harmful to personal privacy), 24 (advice to officials), 25(1) (disclosure harmful to economic and other interests of a public body) and 27 (privileged information). Other information was withheld as non-responsive to the request.

The Applicant requested an inquiry into the Public Body's response, including the adequacy of the search conducted by the Public Body.

The Adjudicator upheld the Public Body's application of section 4, section 17(1) in only one instance, section 16(1) in only one instance, section 24(1) in some instances. The Adjudicator also upheld the Public Body's characterization of records as non-responsive, and found that the Public Body conducted an adequate search for records.

The Adjudicator found that while the Public Body's arguments and evidence regarding its claim of solicitor-client privilege under section 27(1)(a) were sparse, the affidavit provided by the lawyer responsible for advising the Public Body and the remaining records at issue provided sufficient context to uphold the claim.

The Adjudicator found that the Public Body did not properly claim solicitor-client privilege of a third party under section 27(2) over an internal file number that had been included by the third party in correspondence with multiple parties.

The Public Body had withdrawn its application of section 25 in the course of the inquiry so a finding was not made.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 6, 10, 16, 17, 24, 27, 71, 72.

**Authorities Cited: AB:** Decision F2014-D-01, Orders 96-006, 96-012, 97-006, 99-013, 2000-013, F2004-013, F2004-026, F2005-011, F2007-013, F2007-014, F2007-029, F2007-032, F2008-028, F2009-028, F2010-007, F2010-036, F2011-002, F2012-06, F2012-08, F2012-10, F2012-15, F2013-13, F2013-47, F2015-03, F2015-12, F2015-15, F2016-21, F2018-25, F2018-75, , **BC:** Orders F09-04, F11-27, **ON:** Orders MO-2070, MO-2474, MO-2801, PO-2010, PO-2453, PO-3176

**Cases Cited:** *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989), 37 Admin. L.R. 245, *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851, *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, *Canada v. Solosky* [1980] 1 S.C.R. 821, *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII), *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)

## I. BACKGROUND

[para 1] An Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) dated October 1, 2013, to Alberta Infrastructure (the Public Body) for:

- (1) All records, including but not limited to all emails, letters and all meeting/file notes in respect of all communications between Alberta Infrastructure and Pacific Investments and Pacific Developments Ltd. (or any of its predecessors, affiliates, and all employees or agents representing any of these parties ("Pacific")) related to or connected with the purchase by Pacific of the lands referred to as the "Southlands" south of Ft. McMurray, Alberta, as generally depicted on the attached maps (the "Lands"). For clarity, these records should include a copy of the purchase agreement and all drafts thereof as well as

all records of the negotiations and the public auction process in relation to the sale of the Lands including any emails, letters and meeting/file notes exchanged between Alberta Infrastructure and any other party that participated in the public auction process associated with the Lands that Pacific would have had access to as part of that process.

(2) All records, including but not limited to all emails, project information, letters and all meeting/file notes in respect of all communications between Alberta Infrastructure and ATCO Electric Ltd. related to or connected with the North Fort McMurray Area Reinforcement Project (also referred to as Salt Creek to Hangingstone).

[para 2] The Applicant requested a review of the response from the Public Body, as well as the adequacy of the search conducted by the Public Body. The Commissioner authorized an investigation; this was not successful and the matter proceeded to an inquiry.

[para 3] Pacific Investments and Development Ltd. was invited to participate in the inquiry as an affected party. It agreed, and provided submissions on the application of section 16(1). It is referred to in the Order as the Affected Party.

## **II. RECORDS AT ISSUE**

[para 4] The records at issue consist of the withheld portions of the responsive records located by the Public Body. The records at issue provided by the Public Body are organized into two parts: first release (pages 1-296) and second release (pages 1-613). There are also 4 pages under the heading “Additional Pages Found” in the index of records provided by the Public Body (pages 1-4). Most of the records discussed in this Order are of the second release; therefore, unless otherwise indicated, all page numbers refer to pages in the second release of records.

## **III. ISSUES**

[para 5] The issues as set out in the Notice of Inquiry dated June 20, 2016, are as follows:

1. Are records excluded from the application of the Act by sections 4(1)(l) and 4(1)(q)?
2. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act?
3. Does section 16(1) (disclosure harmful to business interests) of the Act apply to the information in the records?
4. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

5. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
6. Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?
7. Did the Public Body properly apply section 27 (privileged information) to the information in the records?
8. Did the Public Body properly withhold information as non-responsive to the Applicant's request?

[para 6] I will be discussing these issues in a slightly amended order.

#### **IV. DISCUSSION OF ISSUES**

##### **1. Are records excluded from the application of the Act by sections 4(1)(l) and 4(1)(q)?**

[para 7] The Public Body argues that pages 43-47, 57-59, 83-85, 89-91, 213-214, 276-281, 348-350, 389-391, 564-566, 583-594 and 611-613 fall outside the scope of the FOIP Act per section 4(1)(l) of the Act. It also argues that page 56 falls outside the scope of the Act per section 4(1)(q).

[para 8] If section 4(1)(l) and/or (q) applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them.

[para 9] The relevant portions of sections 4(1)(l) and (q) state:

*4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

*(l) a record made from information*

*...*

*(v) in a Land Titles Office,*

*...*

*(q) a record created by or for*

*(i) a member of the Executive Council*

*(ii) a Member of the Legislative Assembly, or*

*(iii) or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly*

*that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined*

*in the Financial Administration Act who is a Member of the Legislative Assembly;*

[para 10] The Public Body did not address the application of section 4(1) in its initial or rebuttal submissions. A previous adjudicator specifically asked the Public Body to address the application of section 4(1) by letter dated February 23, 2017. The Public Body responded (March 29, 2017):

4(1)(l) These records is information from the Land Titles Office and are not subject to the FOIP Act and have been withheld in their entirety. The records include a Certified Copy of Certificate of Title, Land Title Certificates, Consent to Register a Plan, Public Works Plan and Alberta Government Services Land Titles Office Image.

4(1)(q) This record was created for/by a Member of the Legislative Assembly and is not subject to the FOIP Act and has been withheld in its entirety. The record is a Memo regarding Recommendations to Accept Offer.

[para 11] Having reviewed the records to which section 4(1)(l) has been applied, I confirm that these are records filed with the Land Titles Office. The copies located by the Public Body in its custody and control are properly characterized as records created from information in a Land Titles Office. Therefore, section 4(1)(l) applies.

[para 12] Regarding section 4(1)(q), previous Orders have determined that for this provision to apply to a record, the record must be created by or for any of the persons listed in section 4(1)(q)(i)-(iii) and must also be sent or intended to be sent to one of those persons (Orders 2000-013 at para. 16, F2008-028 at para. 15 and F2016-21 at para. 13).

[para 13] The Public Body applied section 4(1)(q) to page 56. Having reviewed that record, it is clear that it was created by (or on behalf of) a person listed in section 4(1)(q)(i)-(iii), as stated by the Public Body. It is also clear that it was sent to (or intended to be sent to) a person also listed in that section. Therefore, section 4(1)(q) applies.

**2. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Adjudicator will consider whether the Public Body conducted an adequate search for responsive records.**

[para 14] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

*10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 15] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the Applicant (see Order 97-006, at para. 7).

[para 16] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced (at para. 66)

[para 17] The Applicant's issue regarding section 10 is the adequacy of Public Body's search for records. Specifically, the Applicant is concerned that the Public Body narrowed the Applicant's request.

[para 18] The Applicant's October 2013 access request contains two itemized categories of information sought. By email dated November 21, 2013, sent to the Public Body by the Applicant, the Applicant expressed disappointment that the Public Body would not be responding to its request within the 30-day legislated period. It identified some aspects of its access request that it believed should be easily located, such that they could be provided to the Applicant in a short period of time. The Applicant provided a list of three types of records it believed could be easily located; the Applicant also confirmed that it remains interested in a response to its full access request.

[para 19] In subsequent correspondence from the Public Body to the Applicant, the Public Body referred to the list of items identified in the Applicant's November 2013 email, rather than the Applicant's full October 2013 request. For example, the Public Body's March 11, 2014 response to the Applicant referred to the Applicant's "November 21, 2013" access request, and characterized the request as encompassing the information identified in the Applicant's email of that date.

[para 20] In its initial submission to this inquiry, the Public Body referred to the Applicant's access request as being made on October 1, 2013, but quoted the content of the November 21, 2013 email (rather than the October 1, 2013 request) to indicate the scope of the request. While the Applicant has raised this discrepancy in its April 2014 request for review and its January 2015 request for inquiry, the Public Body has not addressed it directly in its submissions.

[para 21] The Public Body has provided me with copies of the emails dated November 14 to November 22, 2013, sent to program areas to initiate the search for records. These emails quote verbatim the full access request made by the Applicant on October 1, 2013. The Public Body has also provided me with copies of emails between Public Body employees confirming that the scope of the access request is the October 1, 2013 request, and not the narrower version in the November 21, 2013 email. This confirmation was relayed to the Applicant by the Public Body via email on November 27, 2013.

[para 22] I agree that the Public Body's continued reference to the Applicant's November 21, 2013 email in defining the scope of the request is perplexing, especially where it appears in the Public Body's initial submission, after the Applicant has raised this as reason to expect that the Public Body did not fully respond to its request.

[para 23] That said, the evidence provided by the Public Body – specifically the copies of the emails calling for records from program areas and the November 27, 2013 email to the Applicant – indicates that the search for records encompassed the Applicant's full October 2013 request.

[para 24] By letter dated December 20, 2018, I asked the Public Body to address this apparent inconsistency. It responded (by letter dated January 15, 2019) that it “located and processed records in response to the October 1, 2013 request.”

[para 25] With this apparent inconsistency clarified, I find that the Public Body conducted an adequate search for records.

### **3. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?**

[para 26] Section 17 states in part:

*17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

...

[para 27] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 28] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 29] Section 1(n) defines personal information under the Act:

*1 In this Act,*

...

*(n) “personal information” means recorded information about an identifiable individual, including*

*(i) the individual’s name, home or business address or home or business telephone number,*

*(ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*

*(iii) the individual’s age, sex, marital status or family status,*

*(iv) an identifying number, symbol or other particular assigned to the individual,*

*(v) the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*

*(vi) information about the individual’s health and health care history, including information about a physical or mental disability,*

*(vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,*

*(viii) anyone else’s opinions about the individual, and*

*(ix) the individual’s personal views or opinions, except if they are about someone else;*

[para 30] The Public Body applied section 17(1) to one sentence in an email on page 14. The Public Body describes that information as a “comment regarding the writer’s sick child [that has been] withheld as it is personal information and does not relate to the request scope” (March 29, 2017 submission, at page 1).

[para 31] In Order F2016-57, the adjudicator reviewed a public body’s response to an access request for records in the applicant’s student file. She considered the public body’s decision to withhold a sentence that related to another individual and that had no connection to the access request. She found that section 17 applied to the sentence but that it was also not responsive.

[para 32] In Order F2018-75, I agreed that a personal note added to a work email might be non-responsive information where that note does not have any relation to the remainder of the email or to the access request (at para. 57).

[para 33] In this case, the sentence on page 14 is personal information about a family member of a Public Body employee. Section 17(1) applies to that information and it is also not responsive to the Applicant’s request. I find that was properly withheld.

[para 34] With its March 26, 2018 submission, the Public Body provided new copies of some of the pages previously provided with the second release of records. It applied section 17(4) to some information on pages 33-37, and 99, stating (at page 2):

The banking information of the firm should not be disclosed as it would reveal financial information of a third party that was supplied in confidence. Moreover, its disclosure could reasonably be expected to result in undue financial loss to the firm.

Pursuant to s.17(4) of *FOIPPA*, a disclosure of an individual's bank account information is presumed to be an unreasonable invasion of a third party's personal privacy. We would submit that disclosing the bank account information of a legal partnership is not only an unreasonable and unwarranted invasion of privacy, but also serves no practical purpose to the public domain. Rather, it invites breaches of security with respect to the firm, its clients, and its partners.

[para 35] The Applicant argued that section 17 applies only to personal information of an individual. It states (April 23, 2018 submission, at page 2):

Infrastructure applies section 17(4) of the *Act* and is presumably referring to section 17(4)(e.1). Section 17 (4)(e.1) only protects the bank account information of an individual. The bank account information redacted does not appear to be that of an individual. While we cannot determine exactly whose banking information is being referred to, as it is redacted, it appears that the information is that of the public body or of a limited liability partnership. Neither are individuals. Section 17(4)(e.1) does not apply.

More significantly, the volume of material redacted under this exception appears to exceed what would normally be expected for bank account information. For example, records 34-37 are almost entirely redacted. While it is possible that those redactions are appropriate, we are concerned that more of the record may have been redacted than needed to be on account of section 17(4).

[para 36] I agree with the Applicant: section 17(1) applies only to personal information of individuals. The Public Body's submission and the records provided to me indicate that the banking information belongs to an organization and not an individual. The Public Body has not provided any reason to expect that the information relates to an individual. Therefore, section 17(1) (or 17(4)) cannot apply to this information.

[para 37] The appropriate provision in this case is section 16(1). The Public Body's March 26, 2018 submission indicates that this provision was also applied to the same information withheld citing section 17(4), although the records provided to me do not show this. As section 16(1) is a mandatory provision, I will consider its application to this information in any event.

#### **4. Does section 16(1) (disclosure harmful to business interests) of the Act apply to the information in the records?**

[para 38] The Public Body withheld portions of many pages of the records under section 16(1). In many cases, the withheld information consists of the conditions precedent in the agreement to purchase lands between the Public Body and Affected Party. Those conditions show up in draft, amended and finalized versions, in the agreement, amendments to the agreement, emails, and notices to remove the conditions. The Public Body has also applied section 16(1) to other types of information.

[para 39] Section 16 of the Act reads, in part, as follows:

*16(1) The head of a public body must refuse to disclose to an applicant information*

*(a) that would reveal*

*(i) trade secrets of a third party, or*

*(ii) commercial, financial, labour relations, scientific or technical information of a third party,*

*(b) that is supplied, explicitly or implicitly, in confidence, and*

*(c) the disclosure of which could reasonably be expected to*

*(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*

*(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*

*(iii) result in undue financial loss or gain to any person or organization,*  
*or*

...

[para 40] As this inquiry involves information about a third party, the burden of proof set out in section 71(3) of the Act applies. It reads as follows:

*71(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*

*(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*

*(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

[para 41] Section 16(1) does not apply to personal information, so the Affected Party has the burden, under section 71(3)(b), of establishing that the Applicant has no right of access to the records by virtue of section 16(1).

[para 42] For section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met.

- Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party under section 16(1)(a)?
- Was the information supplied, explicitly or implicitly, in confidence under section 16(1)(b)?

- Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)? (Order F2004-013 at para. 10; Order F2005-011 at para. 9)

[para 43] In order to withhold information under section 16(1), each subsection (a), (b) and (c) must be met.

#### Section 16(1)(a)

[para 44] Past Order of this Office have defined “commercial information” as information belonging to a third party about its buying, selling or exchange of merchandise or services. “Financial information” is information belonging to a third party about its monetary resources and use and distribution of its monetary resources (Order F2009-028).

[para 45] Examples of financial information listed in Order PO-2010 from the Ontario Office of the Information and Privacy Commissioner, which was cited in Order F2011-002 from this Office, include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.

[para 46] In Order F2011-002 the adjudicator found that fees for services performed by a third party for a public body, which were contained in requested records, were “commercial information” of third parties because “the information is about the terms under which [the third parties] performed and sold services to the Public Body” (at para. 15).

[para 47] The initial submissions of the Public Body and the Affected Party are similar. In its initial submission the Affected Party states (at page 1):

The third party is a land developer that is regularly engaged in competitive bidding and negotiating with respect to lands for development. In this context, its approach to and its negotiations with third parties (in this case, Alberta Infrastructure) to acquire those lands is a key aspect of its business and competitive position. Therefore, with respect to the information withheld and in issue in this inquiry, the details of negotiations between the parties, the price paid for the lands, the conditions precedent and the satisfaction or waiving of the same between the parties constitute confidential commercial information of the third party.'

[para 48] Both the Public Body and Affected Party point to Clause 23 of the Purchase and Sale Agreement in support of the application of section 16(1), which states:

Each of the parties [sic] acknowledges that the provisions of this Agreement are confidential to the parties and constitute commercial and financial information which has been supplied in confidence. The parties acknowledge and agree that disclosure of the provisions of this Agreement could reasonably be expected to disclose trade secrets, or commercial, financial or technical information, harm significantly the competitive position or interfere significantly with negotiating position of the parties, result in similar

information no longer being supplied and result in undue financial lost to the Vendor. Accordingly, the parties covenant to keep confidential the terms (but not the existence of this Agreement, except that each may disclose same:

- a) To their respective professional advisors;
- b) To their respective lenders;
- c) As maybe required by law, including without limitation of the Freedom of Information and the Protection of Privacy Act (Alberta).

[para 49] Both parties stated that this clause “demonstrates that the Public Body and [the Affected Party] agreed that the provisions of the Agreement constituted commercial and financial information which was supplied in confidence, the disclosure of which could be reasonably expected to harm significantly the competitive and negotiating position of the third party, result in undue financial loss and result in similar information no longer being supplied to the Public Body.” (Initial submission of Affected Party at page 2, Public Body initial submission at page 7).

[para 50] This clause cited by the Public Body and Affected Party acknowledges that information in the Agreement may be disclosed as required by the FOIP Act. While the Public Body and Affected Party have agreed that the information in the Agreement is commercial and/or financial information, this Agreement does not make it so. In order for section 16(1)(a) to apply, the information must meet the test for commercial and/or financial information as set out in the Act and past Orders of this Office.

[para 51] The Applicant argues that the information in the Agreement does not fall within the scope of financial or commercial information as those terms have been described in past Orders of this Office (cited above).

[para 52] The Applicant also argues that the information in the Agreement is not commercial information *of* the Affected Party. It cites Order F2015-12, as stating that information does not fall within the scope of section 16(1)(a) if it is not information that ‘belongs’ to the Affected Party. In that Order the adjudicator considered the application of section 16(1) to a request for records relating to the cost of developing a certain app for a public body by a third party service provider. The information at issue included rates charged by the service provider. The adjudicator found (at paras. 46-48):

The Public Body and the two third parties take the position that information regarding the rates the third parties negotiated with the Public Body to provide services is commercial or financial information within the terms of section 16(1)(a).

I accept that the information about rates contained in the records may reveal something about the terms under which the third parties and the Public Body were prepared to do business with each other, and can be construed as “commercial information” in that sense. The information therefore reveals something about the terms the third parties (and the Public Body) were prepared to accept in order to obtain contracts with the Public Body.

However, the rates in this case were generated by the Public Body and the third parties through negotiations. As a result, it cannot be said that the information belongs to a

third party or the Public Body in the sense of being proprietary information, given that it is the result of their mutual agreement. I am therefore unable to say that the information *belongs* to the third parties.

[para 53] The adjudicator further noted that this analysis is consistent with the application of a similar provision in Ontario (see Ontario Order MO-2801, at paras. 187-188).

[para 54] The Affected Party further argues (rebuttal submission, at pages 2-3):

‘Commercial’ is defined as ‘of, engaged in, or concerned with commerce’ (*Canadian Oxford Dictionary*, 2 ed. Edited by Katherine Barber (Don Mills, Ont.: Oxford University Press, 2004). There is no question that a purchase and sale transaction of a significant piece of land between the government and a business enterprise deals with commerce, and is therefore ‘commercial’. The terms of the agreement setting out this transaction including the conditions precedent, the satisfaction or waiving of conditions, and the memo and letters discussing same are therefore ‘commercial’ in nature. The memo undoubtedly pertains to commercial information as it concerns the state of the lands such as its characteristics, specifications, environmental concerns, and the considerations of Pacific in determining whether to develop the land. The letter at page 115 discusses potential transportation issues and the requirements of Pacific and Transport to address the same, which is also commercial information.

According to the Canadian Oxford Dictionary, ‘financial’ means ‘of or pertaining to revenue or money matters’. It is difficult to conceive how the projected costs and financial impact on Pacific to prepare the land for development given the varying conditions of the lands, and the costs and other financial obligations involved in potential improvements, could not be considered financial information (found at pages 18-21, the "Memo"). This document further discloses the financial capabilities of Pacific through discussing the financial cost and potential profit involved in development given the technical specifications of the land.

[para 55] The dictionary meanings provided by the Affected Party do not differ significantly from the meanings given to these terms in past Orders of this Office (cited above at para. 44-45). The Affected Party has not referred to the meaning given to these terms in past Orders, either to agree with them or dispute their appropriateness in this case. I see no reason to diverge from past precedents in this case.

[para 56] I will consider the application of section 16(1)(a) by information type.

#### *Price paid*

[para 57] On March 26, 2018, the Public Body provided new copies of some pages from the second release of records, with some information severed (some of these pages had previously been withheld in their entirety). The Public Body applied section 16(1) to withhold the amount of a trust cheque provided to the Public Body by a law firm involved in the land purchase (pages 61, 74, 97). As this amount represents the price paid

by the Affected Party for the land, I am satisfied that it is commercial or financial information.

#### *GST number of Affected Party*

[para 58] The GST number of the Affected Party was withheld on pages 87 and 92 of the records released on March 26, 2018. A GST number is a tax number assigned to a business by the Canada Revenue Agency (CRA). This could be characterized as commercial information.

#### *Correspondence from the Affected Party to the Government of Alberta*

[para 59] Pages 18-21 consist of a memo from the Affected Party to the Public Body, in which the Affected Party raises issues and concerns about a project and proposes solutions for the Public Body's consideration. Generally speaking, the memo discusses issues that could affect the viability of the Affected Party's commercial endeavors; as such, I accept that it contains commercial information.

[para 60] Page 115 consists of a letter from the Affected Party to another public body. Generally speaking, the letter communicates the Affected Party's intent or plan to meet a requirement that seems to have been imposed as part of the sale agreement. Given the general (i.e. non-specific) nature of the information in this letter, it is not clear whether this could be characterized as the Affected Party's commercial information, or any other type of information listed in section 16(1)(a). I do not need to make a determination on this matter as the information on this page does not meet the requirements of section 16(1)(b) or (c) (discussed below).

[para 61] Page 148 is also a letter from the Affected Party to the same public body. Much of the letter is obstructed by post-it notes with handwritten notes. These notes appear to have been written by a public body employee. The notes appear to relate to the contents of the letter or possibly to an attachment. However, they cannot be characterized as commercial, financial etc. information of the Affected Party. Regarding the remainder of the letter, it appears to be a cover letter to an attached plan, report, or something similar; it is difficult to discern as only half of the letter is legible. In any event, the attachment may contain information that falls within section 16(1)(a) but the cover letter comprising page 148 does not.

[para 62] Similarly, the letter from the Affected Party to the Government of Alberta comprising page 479 does not contain commercial, financial or other information listed in section 16(1)(a). In general terms, it could be characterized as a 'thank you' letter.

#### *Law firm and realtor information*

[para 63] As will be discussed in the last issue of this Order, the Public Body applied section 27(2) to an internal file number of a law firm. For the reasons discussed in that

section, I find that section 27(2) does not apply. As the information relates to a third party organization, I will consider whether section 16(1) applies.

[para 64] Under section 17(1) I discussed the Public Body's application of that provision to banking information of a third party business (a law firm) on pages 33-37, and 99 (March 26, 2018 release of records). I found that section 17(1) cannot apply, as this is not personal information of an individual. I said that I would consider the application of section 16(1) to that information.

[para 65] That organization (the firm) is not involved in the inquiry but the Public Body's submission states that it consulted with it.

[para 66] The Public Body states in its March 26, 2018 submission that disclosing the banking information

would reveal financial information of a third party that was supplied in confidence. Moreover, its disclosure could reasonably be expected to result in undue financial loss to the firm.

[para 67] The “banking information” consists of an account name, transit number and account number. There is also what appears to be a transaction receipt printout from the firm's banking institution. This printout contains the date of the transaction, transit and account numbers, and the amount involved in transaction. Pages 35-37 and 99 each contain an image of the firm's filled cheque, including the cheque number, date, amount, and reference number. The portions of the records provided to the Applicant clearly state that the cheques are solicitor's trust cheques.

[para 68] The cheques themselves are arguably financial or commercial information of the firm. The amounts on the cheques relate to the purchase price paid by the Affected Party to the Public Body, which is discussed elsewhere.

[para 69] The Public Body has withheld information on page 42, described in the index as “sale summary- realtor and lawyer name and realtor commission (monies).” The name of a company is not commercial, financial, scientific or technical information; nor is it a trade secret. Therefore, it is not information to which section 16(1)(a) applies (see also Order F2015-15, which came to the same conclusion at para. 40).

[para 70] Regarding the amounts paid to the realtor, this could be characterized as commercial or financial information of that company.

[para 71] Regarding the internal file number, it may be said to be commercial information.

### *Conditions precedent*

[para 72] The Public Body has withheld draft, final and amended “conditions precedent” for the purchase agreement, in several of the records at issue. Past Orders

have accepted similar conditions as commercial or financial information of a third party (see Ontario Order M0-2474, at para. 69). With respect to conditions proposed by the Affected Party, I agree. However, the Public Body appears to have been the source of three of the four conditions; I am not certain that such conditions can be characterized as commercial information of the Affected Party. However, I do not need to make a definitive conclusion on this point, as those conditions fail to meet the requirements of section 16(1)(b). I will discuss this in greater detail under that heading, including the difference between the draft, final and amended conditions.

#### *Section 16(1)(a) – conclusion*

[para 73] The information on pages 148, and 479 is not information that falls within section 16(1)(a); neither are the names of third party businesses on page 42. Therefore, I do not need to consider the application of sections 16(1)(b) or (c) to this information.

#### Section 16(1)(b)

[para 74] In order for section 16(1)(b) to apply, the information must have been supplied by the Affected Party (or other third parties, where relevant) to the Public Body in confidence. I will consider first whether the information was supplied by a third party, and if so, whether it was done in confidence.

#### Section 16(1)(b) – Information supplied

[para 75] The Affected Party’s primary arguments relate to the conditions precedent in the purchase agreement (draft, final and amended) and the purchase price paid by the Affected Party. I will consider that information first, and the remaining types of information in turn.

#### *Conditions precedent and price paid by Affected Party*

[para 76] Many past Orders of this Office, as well as from the Ontario Office and the BC Office have held that contracts and agreements are negotiated between a public body and third party, and therefore cannot be found to have been supplied by the third party. This is true even where the contract price is the same as the bid price (see Alberta Order F2009-028 and BC Order F11-27, and Ontario Order PO-2453). This approach has also been upheld by the Ontario Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851 and *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, and the BC Supreme Court in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

[para 77] There are exceptions to this principle: where the information is immutable, or where disclosure of the information in the contract would permit an accurate inference about underlying non-negotiated confidential information supplied by the third party to the public body. I will discuss these exceptions in further detail, below.

[para 78] Where the price paid by the Affected Party appears in the withheld portion of the records at issue, it is the final agreed price. Similarly, in most instances where the conditions precedent appear, they are the final agreed conditions. However, there are some instances where the conditions appear in draft form such that they have not been accepted by the parties in the agreement. A different analysis applies depending on whether the conditions were accepted by the parties or not.

[para 79] The final version of the purchase agreement contains the final conditions that were agreed to by the parties. Some of the copies of the final agreement are signed and some are not, but as long as the conditions in the unsigned copies match the conditions in the signed copies, the conditions are agreed to.

[para 80] There are also several Notices of removal of conditions in the records. Whether or not these Notices are final versions, the conditions contained in them are the conditions that were already agreed to between the parties in the final agreement. Therefore the same analysis applies.

[para 81] There are also several amending agreements that amend portions of the conditions. Only the dates relating to the conditions are amended in these agreements. Some are draft and some are final versions. The final versions (whether signed or not) are agreed to between the parties.

[para 82] Regarding the final versions of the conditions, wherever they appear, I will discuss in detail whether they are negotiated between the parties and therefore not supplied within the terms of section 16(1)(b). First I will discuss whether the draft conditions were supplied by the Affected Party to the Public Body.

[para 83] As I have noted above, three of the four subsections to the conditions appear to be for the benefit of the Public Body rather than the Affected Party; the evidence for this conclusion is found in the records themselves (see the last withheld paragraph on page 5 of the first release of records). It is difficult to conclude that the Affected Party is source of those three conditions.

[para 84] More generally, the records at issue themselves indicate that the conditions in the agreement (and amending agreements) were drafted by Alberta Justice and Solicitor General (AJSG) for the Public Body. This indicates that the conditions were not supplied by the Affected Party. It is unclear in the records whether AJSG drafted all or some of the conditions. By letter dated February 13, 2019, I asked the Public Body whether the conditions precedent were set by the Affected Party or the Public Body (or agent of the Public Body). If the latter, I asked the Public Body how those conditions were supplied by the Affected Party in confidence. I asked a more detailed version of those questions in a letter that was not exchanged with the Affected Party or Applicant, as the questions referred to and revealed information in the records at issue.

[para 85] The Public Body responded that it does not matter whether AJSG drafted the conditions in the agreements if the information was supplied by the Affected Party. I agree; information supplied by a third party is still supplied even if it was copied into another document or rewritten by a public body. However, the only evidence I have in this case as to the source of the conditions is in the records at issue. In my letter sent only to the Public Body, I pointed to particular pages of records that indicate either the Public Body or AJSG were the source of at least some of the conditions precedent. I have found specific references in the records to the Public Body or AJSG as the source of the third and fourth conditions; one reference was provided to the Public Body in my letter, and another reference occurs on pages 266-267.

[para 86] The significance of this point is not that the conditions were drafted by the Public Body (or AJSG), but that the conditions were *proposed* by the Public Body (or AJSG). In other words, the source of these conditions was not the Affected Party.

[para 87] The only exception is where the Affected Party proposed language for amending the third and fourth conditions; however, that page of records was disclosed to the Applicant. The proposal does not appear anywhere else in records that I could find. Nor do the records contain any other instances where the Affected Party proposed language for the conditions. The Public Body has not explained why it disclosed the one proposal put forward by the Affected Party but not the final conditions.

[para 88] I did not find explicit evidence of the source of the first or second conditions. However, like the third and fourth conditions, the second condition is stated to be at the benefit of the Public Body (rather than the Affected Party). It is a condition that does not benefit the Affected Party and it seems unlikely that it would be proposed by the Affected Party. Therefore, on the basis of the evidence before me and on a balance of probabilities, I conclude that the Public Body is the source of that condition.

[para 89] The first condition is stated to be for the benefit of the Affected Party. There is no indication in the records that the Affected Party proposed this condition. But following the reasoning in the preceding paragraph, as it benefits the Affected Party and not the Public Body, I conclude that the Affected Party is the source of that condition. Where the first condition appears in draft form and not in a copy of the final agreement or the amended agreement or Notices of removal (which reflect the final agreement), I find that it was supplied by the Affected Party within the terms of section 16(1)(b). Some examples of where this information appears are on pages 267, 288, 364-365, and 384.

[para 90] There are also drafts of amending agreements, which reflect the final version of the conditions, with the only difference being the relevant dates.

[para 91] As noted, where these amending agreements have been finalized (agreed to) between the parties, I will consider whether this information is not supplied by one party for the reason that it has been negotiated between them (discussed below). In the draft versions, only the dates could be said to be supplied by one party (as the remaining language has already been agreed to). There is no indication that I could find in the

records regarding which party proposed the dates in the draft amending agreements. Unlike the conditions, there is no indication from the dates themselves as to which party would be more likely to have proposed them. Possibly they were discussed verbally between the parties. In any event, the Affected Party has not met its burden to satisfy me that the dates proposed in the draft amending agreements were supplied by the Affected Party. Therefore, I cannot conclude that they were.

[para 92] I already discussed the Notices of removal of conditions, and that the conditions appearing in those Notices reflect the final conditions agreed to by the parties. I will also add that some draft Notices contain handwritten notes, apparently from Public Body (or other public body) employees. Nothing in the handwritten notes indicates that they contain information of the Affected Party supplied by the Affected Party.

[para 93] I will now discuss how section 16(1)(b) applies to the final version of the conditions and purchase price, whether they appear in copies of the final agreement, amended agreements, or Notices of removal.

[para 94] As stated, the general rule is that agreements are negotiated between a public body and third party, and therefore cannot be found to have been supplied by the third party. There are exceptions to this principle: where the information is immutable, or where disclosure of the information in the contract would permit an accurate inference about underlying non-negotiated confidential information supplied by the third party to the public body (Order F2013-47, citing Ontario Order PO-3176).

[para 95] Immutable information is information that, by its nature and in the given context, is not susceptible to change; it is not information that *could have* changed but did not (see Order F2012-15, citing BC Order F11-27). Conditions proposed by one party and accepted by a public body without changes is reflective only of the tendering process chosen by the public body; it does not change the nature of the information contained in the proposals. In other words, the fact that a public body may not have made a counter-offer on a proposal does not mean that the proposal conditions were immutable. To say that proposal conditions are immutable is to say that the bidder could not have offered conditions other than those it did, in fact, offer. As stated in BC Order F11-27 (at para. 13):

In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is ‘supplied’. The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed.

[para 96] The Alberta Court of Appeal discussed at length whether information in an agreement can still be ‘supplied’ within the terms of section 16(1)(b), in *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII) (*Imperial Oil*).

[para 97] The Applicant has argued that the Court of Appeal in *Imperial Oil* accepted that a negotiated agreement is not ‘protected information’; it cites paragraphs 82-83 of that decision, which state:

First of all, as previously noted, it is not the Remediation Agreement itself that must be the protected information. There would be room to argue that negotiated contracts themselves are not “supplied” by either party to the agreement. Imperial Oil did seek to prevent disclosure of the Remediation Agreement simply because it was an agreement, but that was based on it being privileged. The overlapping exemption under s. 16 was not an attempt to prevent the disclosure of the Remediation Agreement as an agreement, but rather because of the information it “would reveal”.

What s. 16(1) protects are documents that “may reveal” protected information that has been supplied by one of the parties. If Imperial Oil supplied protected financial, scientific and technical information to Alberta Environment in order to enable the negotiation of the Remediation Agreement, that information would still be “supplied” and therefore protected. “Supplied” relates to the source of the information, and whether information was “supplied” does not depend on the use that is made of it once it is received. If the disclosure of the Remediation Agreement “would reveal” that protected information, then non-disclosure is mandatory under s. 16. To suggest that information loses its protection just because it ends up “in an agreement that has been negotiated” is not one that is available on the facts and the law. It cannot be the rule that only information that is of no use to the public body is “supplied”.

[para 98] In Order F2015-03, I summarized the Court of Appeal’s finding on this point as follows (at para. 46):

The Court of Appeal’s discussion regarding supplied information was specifically concerned with reports attached to the remediation agreement, which were created by consultants and not up for negotiation. In other words, the content of those reports would not change regardless of the discussions that led to the remediation agreement. I agree with the Public Body that, although it used different language, the Court concluded that the reports attached to the remediation agreement consisted of information that was either immutable (because the content of the reports were not going to change) or that they were comprised of underlying non-negotiated confidential information supplied by the third party.

[para 99] In my view, *Imperial Oil* stands for the proposition that information that was supplied to a public body is no less ‘supplied’ because it ends up as an agreed term in a contract; however, it does not say that all agreed terms are supplied. Only contract terms that meet one of the two conditions discussed above can be withheld under section 16(1).

[para 100] The Applicant goes on to state (rebuttal submission, at page 4):

[The Applicant] acknowledges that in certain circumstances information that is ‘negotiated’ might overlap with information that is ‘supplied’ (*Ibid; Imperial Oil* at para 82). Nevertheless, in this case the best evidence is that the undisclosed information resulted from negotiation. [The Affected Party’s] own submission bears this out. [The

Affected Party] submits that the undisclosed information would reveal ‘the details of negotiations between the parties’ (see page 1 of [the Affected Party’s] Submission).

[para 101] As the Applicant states, the Affected Party’s submissions do acknowledge that the purchase price and conditions precedent in the purchase agreement were terms negotiated between it and the Public Body. For example, the Affected Party’s initial submission states that

Purchase price amendments and conditions amended or waived are negotiated terms in those [competitive bid] processes.

[para 102] The records at issue, the consistent interpretation of section 16(1)(b) in past Orders of this Office and other jurisdictions, as well as case law, and the Affected Party’s submissions all point to one conclusion: the purchase price and final conditions precedent are terms negotiated between the Affected Party and Public Body. They were not supplied within the terms of section 16(1)(b) and cannot be withheld under section 16(1) *unless* one of the two exceptions applies (immutable information, or revealing other information to which section 16(1) applies).

[para 103] The Affected Party’s arguments indicate that it believes that the purchase price and conditions precedent fall within one of the exceptions to the general rule that information negotiated between parties in an agreement is not information ‘supplied’ by one party. The applicable exception, based on the Affected Party’s arguments, is that disclosing the purchase price and/or conditions precedent would reveal *other* ‘protected’ information. The Affected Party argues that the Court of Appeal in *Imperial* found that the agreement in that case must be withheld because it contained information that would reveal (other) protected information. It cites the Court at paragraph 69 (emphasis in original):

There can be little doubt that disclosure of the Remediation Agreement “would reveal” a considerable amount of “protected” commercial, financial, scientific or technical information. The Commissioner concluded that “some, though not all parts of the Agreement” contained protected private information. The section does not, however, necessarily require that the disputed document “contain” the disputed information, nor that the disputed document itself be the protected information. The test is whether disclosure of the document “would reveal” protected information. A cursory review of the Remediation Agreement and the numerous exhibits attached to it confirms that its disclosure “would reveal” a great deal of protected information. Any finding to the contrary would clearly be unreasonable.

[para 104] The Affected Party states that in this case, the entire purchase agreement has not been withheld, only portions. The Affected Party states that the withheld portions, consisting of conditions and waiver or acceptance of conditions, ‘are withheld as they provide insight into [the Affected Party]’s negotiating strategy’ (rebuttal submission, at page 3).

[para 105] In order for this exception to the general rule to apply, the ‘other’ information (the information that is revealed) must itself fall within the scope of section

16(1) – it must be commercial, financial (etc.) information that was supplied by the Affected Party to the Public Body in confidence, the disclosure of which could reasonably result in one of the harms listed in section 16(1)(c).

[para 106] In its rebuttal submission, the Affected Party argues (at page 4):

Production of the conditions “would reveal” a great deal of protected information that Pacific developed about the technical and environmental implications of the subject lands, as well as its commercial viability and development prospects. Further, such documents “would reveal” valuable information concerning [the Affected Party’s] strategy, specifically, characteristics about the lands that it acquires in its land development business and proposed solutions and financial exposure to address those concerns.

[para 107] Having reviewed the conditions, I cannot see how they disclose the information as described by the Affected Party. The conditions reveal the type of ‘due diligence’ that the Affected Party will undertake. However, the conditions do not reveal the specific characteristics of the land that it will be testing for, seeking or demanding. They also do not reveal a particular or proprietary process that the Affected Party will use to inspect the land. The conditions are akin to revealing that a house inspection will look at the foundation, insulation and roof condition; such an inspection is too common a practice to be considered confidential. If the conditions revealed that the Affected Party knew to inspect for a particular *thing* on the land that other businesses might not know to look for, then section 16(1) might be met. But the Affected Party has not given me any such explanation, and the conditions in this case appear far too general to reveal such secret or proprietary information.

[para 108] The Affected Party also seems to argue that disclosure of the conditions precedent would reveal its negotiating strategy. Disclosing the conditions the Affected Party agreed to might reveal something about how the Affected Party chose to negotiate with this public body in this case. However, for the reasons discussed below, how a party chooses to negotiate is not information of the party that is *supplied* to a public body.

[para 109] I made a similar finding in Order F2018-25. In that Order I addressed an organization’s arguments that disclosing a pricing schedule in a service agreement would also disclose the fact that it is willing to accept the terms outlined in the agreement. I said (at paras. 45-46):

In my view, a party’s “willingness” to accept terms is not information that falls within the scope of section 16(1). For this provision to apply, the information supplied by the Affected Party must be the type of information set out in subsection (1)(a) (commercial, financial, labour relations, scientific, or technical information, or trade secrets). A unit price offered in a bid may be commercial information of the bidder supplied in confidence; if so, it is the *unit price* that is the commercial information that was supplied, not the *willingness to accept* that price. The latter is certainly information about the bidder that is implied by its bid (since a bidder wouldn’t offer a price it is not willing to accept) but it is not the type of information captured by section 16(1).

Further, in order for this exception to apply, the accurate inference must be about confidential information supplied by the Affected Party to the Public Body. I do not accept that the Affected Party's willingness to accept the terms in the Schedule can be so characterized. If it could, any signatory to an agreement with a public body could argue that the agreement cannot be disclosed simply because it would reveal the willingness of the signatory to make the agreement. This would result in an absurdly broad application of section 16(1).

[para 110] I find this analysis applicable in this case as well. The Affected Party describes its willingness to accept or waive certain conditions as its 'negotiating strategy'. This is akin to a willingness to accept a price for a service. As stated in Order F2018-25, the Affected Party's willingness to accept or waive conditions, even if it can be characterized as a 'negotiating strategy', is not confidential information supplied by the Affected Party to the Public Body. If it were, any signatory to an agreement with a public body could argue that the agreement cannot be disclosed simply because it would reveal the willingness of the signatory to accept the conditions found in the agreement. As in Order F2018-25, this would result in an absurdly broad application of section 16(1).

[para 111] The same analysis applies to the purchase price and the Affected Party's willingness to accept the purchase price.

[para 112] I conclude that the purchase price paid by the Affected Party and the agreed conditions precedent do not reveal other information of the Affected Party to which section 16(1) would apply.

[para 113] The other exception to the general rule that agreed terms are negotiated and not supplied by a third party is where the information is immutable. I have discussed above what "immutable" means within the terms of section 16(1)(b): immutable information is information that, by its nature and in the given context, is not susceptible to change; it is not information that *could have* changed but did not. As I have found, on a balance of probabilities, that the conditions precedent were not supplied by the Affected Party to the Public Body, they cannot be immutable information of the Affected Party. I also noted that the Affected Party proposed amendments to some of the conditions, for the Public Body's consideration and approval; this indicates that they were not immutable.

[para 114] Regarding the purchase price, I do not have any arguments from the Affected Party or the Public Body that the purchase price was not subject to change. There is also nothing in the records that indicates as much. Generally, the overall price offered and accepted for the purchase of property is a price that is susceptible to negotiation and change (even if the initial bid was accepted unchanged). Therefore, I find that this information is not immutable.

[para 115] I find that section 16(1)(b) is not met with respect to the conditions precedent and the purchase price in the agreements and amended agreements.

### *GST number of Affected Party*

[para 116] The GST number of the Affected Party was clearly provided to the Public Body by the Affected Party.

### *Correspondence from the Affected Party to the Government of Alberta*

[para 117] I have described the memo from the Affected Party to the Public Body at page 18-21 of the second release of records as discussing the viability of the Affected Party's commercial endeavors. This information was clearly supplied by the Affected Party to the Public Body.

### *Law firm and realtor information*

[para 118] The information relating to the law firm is "banking information." By all appearances it was supplied to the Public Body by that third party.

[para 119] The amounts paid to the realtor by the Public Body seem to be an agreed upon amount. The same analysis discussed above regarding the purchase price paid by the Affected Party to the Public Body, and the conditions precedent, also apply to this amount. There is no indication that the amount paid to the realtor was supplied by that realtor rather than negotiated. There is also no indication that the amount is immutable, or that its disclosure would reveal other protected information. Therefore section 16(1)(b) is not met.

[para 120] Regarding the internal file number of the law firm, it was provided in correspondence to the Public Body (and other parties) from the firm. As such, it can be said to have been supplied by the firm.

### Section 16(1)(b) – Information supplied in confidence

[para 121] In order for section 16(1)(b) to apply, the information must be supplied by the third party to the public body, explicitly or implicitly in confidence or would reveal information that was supplied in confidence.

[para 122] I have found that the price paid by the Affected Party to the Public Body per the purchase agreement, the amount paid by the Public Body to its realtor, and the conditions precedent in the agreement (including drafts and amendments) were not supplied within the terms of section 16(1)(b). Therefore I do not need to consider the 'in confidence' portion of section 16(1)(b). That said, I note that some of the draft conditions precedent have been disclosed by the Public Body in the records in at least one instance; it is unclear why they were not disclosed elsewhere.

[para 123] Further, the purchase price was withheld in some instances (for example, on pages comprising copies of cheques), but was disclosed in other instances (for example, at page 38). Further, page 38, which was disclosed to the Applicant in whole, is

comprised of a memo from the Public Body to the Alberta Gazette requesting that the information therein – including the purchase price – be published in the Gazette. This clearly rebuts the claim of confidentiality over that information.

[para 124] I found that the GST number of the Affected Party, the memo at page 18-21, the information withheld on the cheques at pages 33-37 and 99 (of the March 26, 2018 release) were supplied by the relevant third party to the Public Body. I will consider whether it was supplied in confidence. I will do so by the type of information.

[para 125] In *Imperial Oil*, the Court of Appeal stated that the test for confidentiality in section 16(1)(b) is a subjective one. It states (at para. 75):

The exception in s. 16(1)(b) is that the information was “supplied, explicitly or implicitly, in confidence”. That is substantially a subjective test; if a party intends to supply information in confidence, then the second part of the test in s. 16(1) is met. It follows that while no one can “contract out” of the *FOIPP Act*, parties can effectively “contract in” to the part of the exception in s. 16(1)(b). It also follows that the perceptions of the parties on whether they intended to supply the information in confidence is of overriding importance. No one can know the intention of the parties better than the parties themselves. It is therefore questionable whether the Commissioner can essentially say: “You did not intend to implicitly provide this information in confidence, even if you thought you did”.

[para 126] In *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989), 37 Admin. L.R. 245, the Federal Court interpreted section 20(1)(b) of the federal *Access to Information Act* (ATIA), which is similar to section 16 of the FOIP Act.

[para 127] Regarding the test for confidentiality in section 20(1)(b) of the ATIA, the Federal Court stated (emphasis mine):

The second requirement under subsection 20(1)(b), that the information be confidential, has been dealt with in a number of decisions. These establish that the information must be confidential in its nature by some objective standard which takes account of the content of information, its purposes and the conditions under which it was prepared and communicated (per Jerome A.C.J., in *Montana*, supra, at page 25). It is not sufficient that the third party state, without further evidence, that it is confidential (see, e.g., *Merck Frosst Canada Inc.*, supra; *Re Noel and Great Lakes Pilotage Authority Ltd. et al.* (1987), 45 D.L.R. (4th) 127 (F.C.T.D.)). Information has not been held to be confidential, even if the third party considered it so, where it has been available to the public from some other source (*Canada Packers Inc. v. Minister of Agriculture*, [1988] 1 F.C. 483 (T.D.) and related cases, appeal dismissed with variation as to reasons on other grounds, [1989] 1 F.C. 47 (F.C.A.)), or where it has been available at an earlier time or in another form from government (*Canada Packers Inc.*, supra; *Merck Frosst Canada Inc.*, supra). Information is not confidential where it could be obtained by observation albeit with more effort by the requestor (*Noel*, supra). As outlined by Jerome A.C.J. in earlier cases dealing with subsection 20(1)(b):

It is not sufficient that [the applicant] considered the information to be confidential. It must also have been kept confidential by both parties and must not have been otherwise disclosed, or available from sources to which the public has access.

[para 128] The Supreme Court of Canada relied on the factors set out by the Federal Court in *Air Atonabee* when interpreting the same provision of the ATIA in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) (*Merck Frosst*), (at para. 133). It said:

The parties accept the factors identified by MacKay J. in *Air Atonabee* as being appropriate to consider the question of whether information is confidential within the meaning of s. 20(1)(b).

[para 129] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Supreme Court of Canada emphasized the importance of applying one test where the same language is used in provincial and federal access to information statutes (at para. 53). It cited its earlier decision, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) [2012] 1 S.C.R. 23, as making the same point.

[para 130] Because the language in section 16(1)(b) of the FOIP Act and section 20(1)(b) of the federal ATIA is similar, the Supreme Court's decisions in *Air Atonabee* and *Merck Frosst* are relevant to interpreting section 16(1)(b). In my view, those decisions can be read consistently with the Alberta Court of Appeal's decision in *Imperial Oil*. Where both parties agree that information was provided in confidence and there are no other factors to indicate otherwise, I accept that part of the test has been met. This is a more subjective test, as discussed in *Imperial Oil*. However, where there is extrinsic evidence, such as the records themselves, I must also consider that evidence. In my view, this is not inconsistent with *Imperial Oil*; otherwise the Court of Appeal could be interpreted as saying that extrinsic evidence should be ignored or discounted in favour of the parties' subjective positions. I don't read the Court's decision that way. Rather, I understand the Court in *Imperial Oil* saying that the intentions of the parties is a significant factor in the determination of confidentiality, and that the Commissioner (or her delegates) cannot make a finding contrary to those intentions without reason, such as evidence to the contrary.

[para 131] In this case, I understand that the Public Body and Affected Party believe the information supplied by the Affected Party to have been supplied in confidence.

*GST number of Affected Party*

[para 132] The GST number of the Affected Party was withheld on pages 87 and 92 of the records released on March 26, 2018.

[para 133] The Canada Revenue Agency (CRA) website states that

A supplier must include the GST/HST account number on receipts, invoices, contracts, or other business papers it gives out when it supplies taxable goods or services of \$30 or more.<sup>1</sup>

[para 134] Given this, whether or not the parties believed this information to be supplied in confidence, the GST number is not the type of information that can be supplied in confidence because businesses are required to provide this information to customers on receipts and invoices. There is no indication from the CRA website that GST numbers should be protected or considered confidential. Information cannot be supplied in confidence to a public body where it is provided in a non-confidential manner elsewhere.

*Correspondence from the Affected Party to the Government of Alberta*

[para 135] I have described the memo from the Affected Party to the Public Body at pages 18-21 as discussing the viability of the Affected Party's commercial endeavors. I found that the information in the memo was clearly supplied by the Affected Party to the Public Body. It is also clear that the information in the memo is the type of information that would be supplied in confidence.

*Law firm and realtor information*

[para 136] I described the information of the law firm, described as "banking information," including an account name, transit number and account number. There is also what appears to be a transaction receipt printout from the firm's banking institution. This printout contains the date of the transaction, transit and account numbers, and the amount involved in transaction. Pages 35-37 and 99 each contain an image of the firm's filled cheque, including the cheque number, date, amount, and reference number. The portions of the records provided to the Applicant clearly state that the cheques are solicitor's trust cheques.

[para 137] As stated in Ontario Order MO-2070, cheques are a common method of payment that generally does not carry any expectations of confidentiality. This reasoning was followed in Alberta Order F2007-032 (at para. 56).

[para 138] I agree. Cheques are routinely used by individuals and organizations (public and private) and are transferred without an implied expectation of privacy. Given this, in order to conclude that the information on the cheques was supplied in confidence, the Public Body would have to provide evidence of this expectation, aside from the records themselves. It has not done so.

[para 139] Nor has the Public Body provided any reason to expect that disclosing the information on the cheques could lead to financial harm to the business, aside from the mere assertion made in its March 26, 2018 submission (cited above at paragraph 66). If

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<sup>1</sup> <https://www.canada.ca/en/revenue-agency/services/e-services/e-services-businesses/confirming-a-gst-hst-account-number.html>

the information contained in a cheque could reasonably be expected to result in financial harm if disclosed, it is unlikely that cheques would be a common method of payment.

[para 140] The same can be said for the receipt of transaction printout on page 34, as this reveals the same information as on the cheques.

[para 141] I find that section 16(1) does not apply to the information of the firm withheld on pages 33-37, and 99 of the March 26, 2018 release of records.

[para 142] Regarding the internal file number of the law firm, it was provided in correspondence to the Public Body, as well as correspondence to other parties. There is no indication in any of this correspondence that the internal file number was in any way confidential. Therefore section 16(1)(b) is not met.

#### Section 16(1)(c)

[para 143] Most of the information to which section 16(1) has been applied by the Public Body has failed to meet the requirements of sections 16(1)(a) and/or (b). The only information that has met those requirements is the memo from the Affected Party to the Public Body at pages 18-21 and the draft condition (the first of four conditions) appearing in draft versions of the agreement to purchase. I will consider the application of section 16(1)(c) only to that information.

[para 144] Section 16(1)(c) requires that disclosure of the information result in one of the harms set out in subsection (i) to (iv). The Affected Party's submissions state that disclosure would harm its competitive or negotiating position; this argument relates to section 16(1)(c)(i), which states:

(c) *the disclosure of which could reasonably be expected to*

(i) *harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*

[para 145] The Applicant correctly cited the test to be used in applying the 'harms test' wherever it appears in the Act. The Supreme Court of Canada stated in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, stated:

This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the

allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

[para 146] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054; Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information. He said:

While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged. [my emphasis]

[para 147] The Applicant argues (rebuttal submission, at page 4):

[I]t is not plausible that disclosure about the terms of a historical purchase of land could cause harm to [the Affected Party] in the manner alleged or at all. [The Affected Party] cites harms relating to divulging its negotiating strategy, which a single transaction cannot expose.

Similarly, there is certainly no reasonable expectation that disclosure of the redacted contractual terms could 'result in similar information no longer being supplied to the public body' (section 16(1)(c)(ii)). This risk does not logically apply to the terms of a negotiated agreement. By the nature of the business of land developers like [the Affected Party], they must consider the purchase of land at public auction and consummate such purchases if deemed advisable. The weak fit of this statutory consideration of harm with the information sought to be withheld further reinforces [the Applicant's] argument that the information in question is not 'of [the Affected Party]' or 'supplied' by it at all.

[para 148] The Public Body's arguments regarding section 16(1)(c) refer only to the disclosure of the purchase price paid by the Public Body and of the conditions precedent.

[para 149] The Public Body has also cited BC Order F09-04, in which the BC Commissioner described the purpose of the FOIP Act in providing accountability of public bodies for large-scale spending. The passage cited by the Public Body says:

A central goal of FIPPA, which has been in force for over 15 years, is to make public bodies more accountable to the public through a right of public access to records, subject to only limited exceptions. FIPPA should be administered with a clear presumption in favour of disclosure and, as I said in Order F07-15, nowhere is the right of access more important for the accountability of public bodies to the public than in the arena of public spending through large-scale government outsourcing of public services to private

enterprise. Businesses that contract with government must fully appreciate that the transparency of those dealings has no comparison in fully private transactions.

[para 150] The Public Body argues that the Affected Party is not delivering services on behalf of the Government of Alberta and therefore it has an expectation of privacy.

[para 151] It seems that the Public Body has misinterpreted the comments made by the BC Commissioner in the excerpt cited above. The BC Commissioner noted that the right of access to government information is especially needed to ensure accountability in large-scale government outsourcing contracts. The Public Body seems to argue that because the agreement at issue in this case is *not* an outsourcing contract, there is *no* need for the right of access to extend to the records at issue here. That is not the case. Section 6 of the Act specifically states that unless an exception to access applies, a public body must provide access to requested records, if the records are in the public body's custody and control (and are not specifically exempted from the scope of the FOIP Act under sections 4 or 6, neither of which apply here). While it may be true that the Affected Party is not providing services on behalf of the Government of Alberta, it did purchase assets of the Government of Alberta. I can't see any reason to conclude that the sale of large assets of the Government of Alberta should be less deserving of scrutiny than a contract for service. In any event, contracts and agreements with public bodies become subject to the FOIP Act when the record relating to them are in the custody or control of a public body (subject to exemptions under sections 4 and 6, none of which apply here). Unless an exception applies, there is no reasonable "expectation of privacy" in that information.

[para 152] The Affected Party has provided specific arguments regarding the harm from disclosing the memo at pages 18-21. It states (rebuttal submission, at pages 4 and 7):

With respect to the Memo, this document represents development issues and proposed solutions to the subject land acquisition. This information is vital to land development strategy as it discusses environmental, geotechnical, and transportation reports and requirements, and would reveal protected commercial information of [the Affected Party].

...

The memo contains [the Affected Party]'s own market and development analysis and information relating to the physical condition of the subject lands. This document contains valuable information about the assessments and methodology that [the Affected Party] undertakes in analyzing land for potential purchase. A competitor could easily use this information to enhance its own process, therefore stripping [the Affected Party] of its competitive advantage.

Disclosure of any of the redacted information would certainly have the chilling effect of "discouraging third parties from providing information to the public body when it is in the public interest that similar information be supplied" satisfying the requirement of subsection 16(1)(c) (*Imperial* at para 87).

[para 153] With its rebuttal submission, the Affected Party also provided an affidavit sworn by its communications director. The affiant states (at paras. 9-10):

The redacted memo and letters (at pages 18-21, 115, 148 and 479) are also valuable commercial information of [the Affected Party] deserving of protection.

These documents contain [the Affected Party]'s own analysis of the physical condition of the land, and the financial and environmental implications of developing the same. This information was supplied to Infrastructure to provide insight into [the Affected Party]'s requirements, [the Affected Party]'s proposed use of the lands, and to provide a basis for further negotiation. This memo contains technical data and development strategy, including specific methodologies that [the Affected Party] uses in carrying out site assessments and analysis. Its disclosure would harm [the Affected Party]'s competitive position and interfere with [the Affected Party]'s negotiating position as competitors would have a "roadmap" of how to analyze sites for development, and could undermine [the Affected Party]'s competitive position by imposing less requirements on any potential vendor

[para 154] I accept that the information in the memo at pages 18-21 could significantly interfere with the Affected Party's negotiating position if disclosed. Specifically, the information in the memo could be used to the detriment of the Affected Party in its future dealings affecting the land.

[para 155] With respect to the conditions precedent (specifically the first condition), the Affected Party argues that they would give insight into its negotiating strategy and would allow competitors to outbid it by requiring less onerous conditions. The Affected Party has also argued that the chain of amendments to the conditions show its negotiating strategy; however, the amended conditions failed to meet the requirements of section 16(1)(b), as discussed above.

[para 156] These arguments of the Affected Party are assertions of harm without support. It is not clear how a condition regarding the purchase of land in 2010-2011 could affect its bid for land in a future instance. The Affected Party has not indicated that its condition is in any way unique or unusual in the circumstance and it appears to me to be quite expected in the purchase of land. The explanation provided by the Affected Party is not evidence "well beyond" or "considerably above" a mere possibility of harm, as required by the Supreme Court.

[para 157] Regarding the argument that this information would not be supplied to the Public Body in the future if disclosed, this is difficult to fathom. That a proposed buyer would not provide a public body – as the seller of land – with a condition precedent that benefits the proposed buyer over the seller seems highly unlikely at best. I do not accept this argument.

#### Conclusions regarding section 16(1)

[para 158] I am satisfied that section 16(1)(c) is met with respect to the memo at pages 18-21 of the second release of records.

[para 159] Regarding the remaining information to which section 16(1) was applied, some is not information that falls within section 16(1)(a), some was not supplied by the Affected Party (or other third parties), some was not the type of information that would have been supplied in confidence, and some did not satisfy the harms test set out in section 16(1)(c).

**5. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

[para 160] The Public Body applied sections 24(1)(a), (b) and (c) to information on pages 245-246, 266, 319, 320-321, 489-494, and 581-582 of the records at issue. These sections state:

*24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*

*(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

*(b) consultations or deliberations involving*

*(i) officers or employees of a public body*

*(ii) a member of the Executive Council, or*

*(iii) the staff of a member of the Executive Council,*

*(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,*

...

[para 161] In previous orders, the former Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p.9)

[para 162] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 163] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that

It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making. (At para. 115)

[para 164] In Order F2012-10, the adjudicator clarified the scope of section 24(1)(b):

A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision. (At para. 37)

[para 165] Further, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 166] Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposal, recommendations etc. such that they cannot be separated (Order 2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 167] For information to fall under section 24(1)(c), it must reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government or a public body, or considerations that relate to those negotiations. A “consideration” is a fact or thing taken into account in deciding or judging something (Order 99-013 at para. 44).

[para 168] The constraints applicable to sections 24(1)(a) and (b) also apply where section 24(1)(c) is cited for withholding information (Orders 96-012 at para. 37, Decision F2014-D-01).

[para 169] Given these limits on the application of section 24(1), even where it applies to information on a page, it is often the case that portions of a page will be disclosed with discrete items of information withheld (i.e. often entire pages cannot be withheld under this provision). Public bodies must therefore conduct a line-by-line review of each page

in order to apply section 24(1) appropriately. It is clear from the records at issue that the Public Body has not done such a review in this case. I will therefore instruct the Public Body how to properly sever the pages containing information to which section 24(1) applies. It is preferable that public bodies perform this review in the first instance as they are in a better position to do so: public bodies know their program areas and are more familiar with the information in the records than I am. Further, it may be appropriate to give deference to a public body's decisions regarding how to sever information to which section 24(1) applies if the public body clearly turned its mind to a proper line-by-line review of the record (and can explain how it did so).

[para 170] The first step in determining whether sections 24(1)(a), (b) and/or (c) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice etc.", section 24(1)(a)); consultations or deliberations between specified individuals (section 24(1)(b)); or positions, plans, procedures, criteria or instructions (which I will refer to as "positions, plans etc.", section 24(1)(c)).

[para 171] The Public Body's submissions on its application of section 24(1) are limited to the following (March 29, 2017 submission):

All records redacted under section 24(1) are advice from officials. The records include briefings for the Deputy Minister and Assistant Deputy Minister, email correspondence and an action request with documentation.

[para 172] Pages 245-246 are described in the Public Body's index of records as a briefing, which is an accurate description. These pages include advice, options and recommendations made to individuals with authority to make a decision. Some information consists of positions, plans etc. However, some of the information on the pages does not reveal the substance of the advice etc. or positions, plans etc. such that it can be withheld. The header, date and subject line of the briefing and underlined headings do not reveal the substance of any advice, positions or plans etc. The sole paragraph under the first heading, and the first two bullets under the second heading consist of bare facts (background facts) that do not reveal the substance of the advice, positions or plans. The remainder of the information on these pages, except the author of the briefing and contact information at the bottom of page 246, consist of advice, positions or plans under sections 24(1)(a) and (c).

[para 173] Page 266 is described in the index of records as "email correspondence." There are two emails, which consist of updates on several items. The names in the to/from/cc lines, the dates and the subject lines (which reveal only the topic of discussion) cannot be withheld under section 24(1). The items numbered 2-5 relay decisions that have been made or actions that have been taken; these cannot be withheld under section 24(1). The last paragraph consists of an opinion about an employee's workload; this is not information to which section 24(1) applies.

[para 174] Item 1 consists of two sentences covering three lines. The last half of the first sentence in that item (i.e. the first half of the second line in item 1) reveals the

content of a deliberation. The first half of the first sentence (comprising the first line in that item) and the second sentence do not reveal the deliberations; nor do they reveal any other advice, consultations, deliberations, positions, plans etc. Therefore section 24(1) applies only to the last half of the first sentence (on the second line) in item 1. The second to last paragraph on page 266 (which starts with a name) consists of a request for action or an instruction; most of that paragraph is not information to which section 24(1) can apply. The last five words of the first sentence (of two sentences) in that paragraph reveals the information in item 1 to which section 24(1) applies. Therefore, section 24(1) applies to those five words as well.

[para 175] Page 319 is described in the index of records as “email correspondence.” There are two emails on the page. The emails indicate that the correspondents were involved in consultation and/or deliberation on a topic; however, the content of the consultation/deliberation are located in attachments, not in the emails themselves. The emails reveal only the topic of the consultation/deliberation and do not reveal substantive content. Therefore, section 24(1) does not apply to the information on this page, with one exception. That exception is the second of three paragraphs in the first email, which reveals factors that were considered (or were to be considered) in the consultation/deliberation. Section 24(1)(b) applies to that paragraph.

[para 176] Pages 320-321 are described in the index as a “briefing for Minister.” The header, headings, subject line, dates, and contact information is not information to which section 24(1) applies. The first bullet point contains mere facts, some of which seem to have already been made public. The first sentence of the second bullet point is also mere background facts. The remainder of the briefing on these pages reveals the substance of advice and deliberations; sections 24(1)(a) and (b) apply that information.

[para 177] Pages 489-494 are described in the index as “Action Request with documentation.” Page 489 is basically a cover page. It reveals the topic of the advice in the attached pages, but not the substance of the advice. Pages 490-491 consists of a briefing. The header, headings, subject line, dates, and contact information are not information to which section 24(1) applies. The sole sentence under the first heading, and the first two bullets under the second heading reveal only background facts. The remaining information reveals the substance of advice.

[para 178] The information on page 492 reveals only the topic of the advice and not the substance. Therefore, it cannot be withheld. The information on pages 493 contains information referred to in the briefing – to which I found section 24(1)(a) applies – in another format. As such section 24(1)(a) applies to it as well.

[para 179] The information on page 494 is a plan, report (or similar) that appears to have been provided to the Public Body by the Affected Party. It also reveals information in the briefing to which section 24(1)(a) applies; therefore the provision applies to the information on page 494.

[para 180] Pages 581-582 are described in the index as “briefing for Assistant Deputy Minister”. The header, headings, subject line, dates, and contact information are not information to which section 24(1) applies.

[para 181] The briefing does not advise the intended recipient, nor does it seek advice. Some of the information appears to merely relay facts to the intended recipient. However, the briefing refers to ongoing deliberations between the Public Body and another public body relating to the matter discussed. If information in the briefing reveals deliberations between public body employees, section 24(1)(b) is applicable. It would have been helpful to have specific arguments from the Public Body to help delineate between mere background facts and facts that reveal the content of the deliberation, since records of the actual deliberation are not before me.

[para 182] Based on the content of the records, the first page is comprised of a list of mere background facts. Some of the information on the second page appears to relay only facts, but the substance of the deliberation (revealed near the end of the page) and the parties involved in the deliberation indicate otherwise. I accept that the information on the second page reveals the substance of deliberations within the terms of section 24(1)(b).

#### *Exercise of discretion*

[para 183] Section 24(1) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 184] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 185] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded:

In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*. (At para. 104)

[para 186] None of the submissions of the Public Body refer to its exercise or discretion, or otherwise reveal why the Public Body decided to withhold information under section 24(1). Therefore, I will order the Public Body to reconsider its exercise of discretion with respect to its continued application of this provision, taking into consideration all relevant factors and no irrelevant factors.

**6. Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?**

[para 187] The Public Body's March 29, 2017 submission clarifies that the information previously withheld under section 25(1) of the Act is now being withheld as non-responsive (pages 378-382). I have addressed this new decision regarding these records in Issue 8 of this Order, below.

[para 188] As the Public Body no longer applies section 25(1) to any information in the records, it is no longer an issue for this inquiry.

**7. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?**

[para 189] The Public Body withheld several records in their entirety, claiming solicitor-client privilege under section 27(1)(a). The Public Body also withheld items of information, from other records, citing privilege of a third party under section 27(2).

[para 190] Section 27 of the Act states:

*27(1) The head of a public body may refuse to disclose to an applicant*

*(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*

...

*(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*

...

[para 191] I will first consider the Public Body's own claim of privilege under section 27(1)(a), and its exercise of discretion. Then I will consider the Public Body's application of section 27(2).

*Solicitor-client privilege under section 27(1)(a)*

[para 192] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821. The Court said:

... privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 193] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 194] In its initial submission the Public Body states that the information withheld under section 27(1) is “legal advice and classified as solicitor-client privilege” (at page 8). It provided an affidavit with the initial submission. The affidavit is sworn by a lawyer of the Government of Alberta, responsible for providing advice to various public bodies, including Alberta Infrastructure. The affiant states that he provided legal advice to the Public Body in 2010-2011 on matters involving the Applicant. The affiant states that the information withheld under section 27(1)(a) was “created exclusively for the purpose of seeking legal advice or providing legal advice and [was] exchanged in confidence between [the affiant], as legal advisor, and [his] Infrastructure clients” (at para. 5).

[para 195] For the following reasons, I find on a balance of probabilities that the Public Body properly claimed solicitor-client privilege over the records so identified in the index of records.

[para 196] The Public Body’s submissions regarding its claim of solicitor-client privilege are sparse, as is the affidavit provided in support. I know from the Public Body’s index of records the format of each record over which privilege is claimed: they are all emails, a few with attachments.

[para 197] In the affidavit, the affiant states that he is a lawyer tasked with providing legal advice to various departments in the Government of Alberta, including the Public Body. He states that he provided legal advice to the Public Body in matters involving the Applicant. He states that the records identified as being withheld under section 27(1)(a) were created for the purpose of seeking or providing legal advice, exchanged in confidence.

[para 198] This is not a particularly detailed affidavit; however, it is significant that it was sworn by the lawyer who provided the advice being withheld.

[para 199] In another situation, such a limited amount of information provided by the Public Body to support its claim of solicitor-client privilege under section 27(1)(a) may not be sufficient to meet its burden of proof.

[para 200] In this case, the records at issue provide sufficient context to the claim such that I can make a determination on the balance of probabilities. The subject of the access request and the responsive records provide the general subject matter for the advice. Some records that were provided to me refer to obtaining advice from the lawyer who swore the affidavit. The topics being discussed in those records are the type that could reasonably require legal advice. Nothing in the records or submissions of the parties leads me to question the Public Body's claim.

[para 201] I find that the Public Body properly applied section 27(1)(a) to the records identified in the index of records as protected by solicitor-client privilege under that provision.

#### *Exercise of discretion*

[para 202] Section 27(1)(a) is a discretionary exception to access, which means that after determining that the information at issue falls within the exception, the public body must then determine whether the information should nevertheless be disclosed.

[para 203] With respect to the exercise of discretion under section 27(1)(a), withholding information that is subject to solicitor-client privilege is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036). The adjudicator in Order F2012-08 stated (citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), at para. 78):

the public interest in maintaining solicitor-client privilege is such that it is unnecessary to balance the public interests in withholding records subject to this privilege and those in relation to disclosing them, as the public interest in withholding such records will always outweigh the interests associated with disclosing them.

[para 204] As I have found that the information in the records at issue is subject to solicitor-client privilege, I conclude that the Public Body properly exercised its discretion to withhold the information it withheld under section 27(1)(a).

#### *Section 27(2)*

[para 205] The Public Body initially withheld the following pages in their entirety citing section 27(2): pages 33-37, 53, 61, 62, 64, 71, 72, 74, 75, 82, 87, 88, 92, 93, 97-99, 102-106, and 424. Page 54 was withheld in part.

[para 206] By letter dated February 7, 2018, I asked the Public Body several questions about its application of that provision. In its March 26, 2018 response, the Public Body informed me that it had consulted with the third party and revised its application of section 27(2). It is now applying that provision to a few discrete items of information on pages 33, 61, 82, and 97. The Public Body refers to this information as an internal file

number. A few items of information were withheld under sections 16(1) and 17(1) (discussed under the relevant headings in this Order). The remainder of the records were disclosed to the Applicant.

[para 207] In this response, the Public Body supported its application of section 27(2) to the internal file number, stating:

At paragraph 33 of *Maranda c. Quebec (Juge de la Cour du Quebec)*, 2003 SCC 67, the Supreme Court of Canada specifically held that information contained in lawyer's bills of accounts attracted a *prima facie* presumption that the information was privileged. Decisions of the Alberta Information and Privacy Commissioner have interpreted this passage as holding that the presumption stems from the nature of the information arising “from the solicitor-client relationship”: see *Edmonton Police Service, Re*, [2008] AIPCD No. 72 at paragraph 47.

Not only does the internal file number arise from the solicitor-client relationship, it numerically identifies all specific communications that attract *prima facie* solicitor-client privilege. If these file numbers were to be publicly released, and a breach of the firm's network occurred, all privileged communications would be readily accessible. Additionally, disclosure of this internal file number serves no practical purpose. This information should therefore be redacted to protect solicitor-client privilege.

[para 208] In its April 23, 2018 response, the Applicant argues that “typically only confidential records between a lawyer and the lawyer's client are subject to solicitor-client privilege. The records at issue here are not between a lawyer and the lawyer's client, but are instead between the Affected Party's various law firms and one or more of the CIBC and Infrastructure. The solicitor-client privilege that may have once attached to the records, if any, would have been waived when the records were shared with the CIBC or with Infrastructure.” (at page 2).

[para 209] By letter dated February 13, 2019, I gave the Public Body an opportunity to respond to that argument. More specifically, I asked the Public Body to address how an ‘internal file number’ can be protected by solicitor-client privilege in the context of the other information in the records that was disclosed. I also asked how the privilege can apply when it appears in a letter to a party that appears to be outside the solicitor-client relationship.

[para 210] The Public Body responded by letter dated March 5, 2019, repeating verbatim what (and only what) it had already said on March 26, 2018. The affidavit provided by the Public Body in support of its claim of privilege under section 27(1)(a) (discussed above), sworn by a lawyer who provided advice to the Public Body, does not extend to the application of section 27(2) and so does not provide any insight.

[para 211] A file number appearing on a cover letter with a solicitor's trust cheque is not the same as a lawyer's bill of account. It is therefore not clear how *Maranda* applies. The Public Body has also argued that if file numbers are disclosed, in the event of a breach of the firm's network, privileged communications would be accessible. It seems to me that a breach of a firm's network would render its electronic files accessible

regardless of the disclosure of file numbers. File numbers may help locate or identify particular information, but that does not thereby make the file number subject to solicitor-client privilege.

[para 212] I also agree with the Applicant that any privilege appears to have been waived by providing the file number to multiple parties outside the solicitor-client relationship.

para 213] For these reasons, I find that section 27(2) does not apply to the information withheld under that provision. I also found that it could not be withheld under section 16(1).

### **8. Did the Public Body properly withhold information as non-responsive to the Applicant's request?**

[para 214] The Public Body has withheld portions of two emails at page 10 as non-responsive. The Public Body states that these portions of the emails relate to comments about a hockey game.

[para 215] The Public Body has withheld pages 31-32 as non-responsive in their entirety. The Public Body states that these pages are a copy of the listing agreement between the Public Body and a realty company.

[para 216] The Public Body has withheld pages 376-382 as non-responsive, stating that these pages consist of an offer to purchase between the Public Body and the City of Calgary. The Public Body further clarified in its March 29, 2017 submission states that these records "relate to "Southlands" in the Calgary area, not "Southlands" in the Fort McMurray area" (at page 3).

[para 217] Having reviewed the records, I can confirm that the above characterization of pages 10, 31-32 and 376-382 is accurate. I agree that the information withheld on these pages is not responsive to the Applicant's access request.

## **V. ORDER**

[para 218] I make this Order under section 72 of the Act.

[para 219] I find that pages 43-47, 57-59, 83-85, 89-91, 213-214, 276-281, 348-350, 389-391, 564-566, 583-594 and 611-613 are excluded from the scope of the FOIP Act per section 4(1)(l) and are outside my jurisdiction.

[para 220] I find that page 56 is excluded from the scope of the FOIP Act per section 4(1)(q) and is outside my jurisdiction.

[para 221] I find that the Public Body conducted an adequate search for records.

[para 222] I find that section 16(1) applies to the information on pages 18-21 of the second release of records and uphold the Public Body's decision to withhold it. All other information withheld under that provision, or over which I considered that provision, must be disclosed, as no other provisions were found to apply.

[para 223] I find that the sentence withheld on page 14 was properly withheld under section 17(1) and also as not responsive to the request.

[para 224] I find that section 17(1) does not apply to the information withheld under that provision on pages 33-37 and 99 as this is not information about an individual.

[para 225] I find that section 24(1) applies to the information described at paragraphs 172, 174-179, and 182 of this Order. However, I order the Public Body to exercise its discretion as to whether to withhold that information, per paragraph 186. If the Public Body decides to continue to withhold the information, I further order it to provide an explanation to the Applicant of how it exercised its discretion to do so.

[para 226] I order the Public Body to disclose the information to which section 24(1) was found not to apply, as no other provision was found to apply.

[para 227] I find that section 27(1)(a) applies to the information over which the Public Body claimed solicitor-client privilege.

[para 228] I find that section 27(2) does not apply to the information withheld under that provision. As no other provision applies, I order the Public Body to disclose it.

[para 229] I find that the portions of page 10 withheld as non-responsive, and pages 31-32 and 376-382 in their entirety (all from second release), are not responsive to the Applicant's request.

[para 230] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek  
Adjudicator